

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

76-1601

SECOND CIRCUIT—CRIMINAL—BRIEF FOR DEFENDANT

UNITED STATES COURT OF APPEALS
For the Second Circuit

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Docket No. 76-1601

UNITED STATES OF AMERICA,

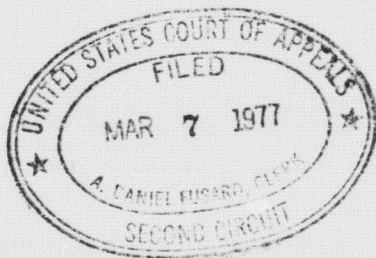
Appellee,

v.

FRANK BYRNES,

Defendant-Appellant.

and appended
BRIEF FOR DEFENDANT



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In this brief (CT__) will refer to the documents composing the record on appeal as set out in the index and page number. (RT__) will refer to the page numbers in reporters transcript of Trial proceedings. EX will refer to exhibits introduced at the trial and referred to in the reporter's transcript of the trial proceedings

PRELIMINARY STATEMENT

The decision herein appealed from was rendered by Judge Edward Neaher of the Eastern District Court. His opinion is unreported.

THE ISSUES

The issues presented by this appeal are:

1. Whether the trial judge erred in his evidentiary ruling excluding from evidence the passport of Byrnes as a probative document to controvert testimony that Byrnes went to Peru .
2. Whether the trial judge erred in denying Byrne's motion to dismiss the Indictment as the evidence is insufficient as a matter of law, because at best, it only shows that Byrnes was only associated with defendant Burgos and Dait.

STATEMENT OF THE CASE

Appellant was indicted by the Grand Jury in the Eastern District of New York, Cr. No. 75 CR 746, on October 10, 1975. The Indictment contained seven counts. The Indictment charged in count one that FRANK BYRNES, ("Byrnes"), co-defendant, CARLOS BURGOS ("Burgos") and DAVID DAIT ("Dait"), named as a co-conspirator but not as a defendant, conspired to distribute cocaine in violation of Title 21 U.S.C. 841(a)(1) (Title 21, U.S.C. 846). The alleged overt acts were (1) That Byrnes, Burgos and Dait met in Queens, New York on

December 26, 1974; (2) that Byrnes, Burgos and Dait met in Queens, New York, on January 10, 1975. Counts Two, Four and Six respectively allege that on December 26, 1974, January 10, 1975 and January 30, 1975, the defendants Burgos and Byrnes possessed with intent to distribute approximately two ounces of cocaine Hydrochloride, all in violation of Title 21 U.S.C. 841(a)(1) and Title 18 U.S.C. 2. Counts Three, Five and Seven respectively allege that on December 26, 1974, January 10, 1975 and January 30, 1975, the defendants Burgos and Byrnes did distribute approximately two ounces of cocaine hydrochloride, all in violation of Title 21 U.S.C. 841(a)(1) and Title 18 U.S.C. 2.

A jury trial was had, and a finding of guilty was returned on all seven counts against both defendants on October 1, 1976. Judgment and Commitment was entered on December 9, 1976, against the defendant Byrnes providing for imprisonment of the defendant Byrnes for a period of two years to run concurrently as to each of the seven counts and a special parole term of five years (CT-15). Notice of Appeal was timely filed on December 9, 1976. (CT-16). The execution of sentence was stayed pending appeal and authorizing this appeal in forma payperis to the United States Court of Appeals for the Second Circuit from the final judgment entered in this proceeding on December 9, 1976. (RT-508-512). A motion having been made for an extension of time to file a brief and appendix, the order of the United States Court of Appeals dated December 30, 1976 was amended and ordered that the record on Appeal and that the Brief, transcript and appendix be filed on or before March 7, 1977. (CT-19)

The jurisdiction of the Court to review the judgment of the District Court is conferred by the provisions of Title 28 U.S.C. 1291 and 1294(1).

DISCUSSION OF THE EVIDENCE

On August 28, 1975, Bernard Sierra, a New York City undercover detective appeared before the Grand Jury to give testimony as a government witness in this case. In describing a conversation that allegedly took place on January 10, 1975, between Sierra and Dait, the unindicted co-conspirator, the following testimony evolved:

"Q Did you then ask Dait if he could sell one-half pound weight of cocaine?

A That's correct.

Q What did Dait tell you?

A Dait said that his man Frank can do any kind of weight I wanted to do, because he makes frequent trips to Peru, Florida plus he is opening up an import-export business.

Q And in your experience as an undercover detective, what does that mean, that he is operating an import-export business?

A That he is doing first class cocaine, there is no problem for him to get anything he wants." (RT-4)

An examination of the entire testimony of David Dait as contained in his sworn statement of July 31, 1975 (EX-3); Dait's testimony before the Grand Jury, August 21, 1975; (CT-4) and Dait's testimony on direct and cross-examination; (CT-6,7) conclusively establish

that the record is devoid of any evidence in support of Sierra's testimony which he attributed to Dait. That testimony left uncontroverted, before a Grand Jury, unsupported and uncorroborated was designed and did in fact severely prejudice the Grand Jury in creating the impression that Byrnes was involved in the traffic of narcotics and it can be reasonably inferred that the Grand Jury could find probably cause to indict Byrnes.

That on September 28, 1975, Sierra on direct examination repeated to the Court before the jury that he had asked Dait whether he could do more weight and responded that Dait stated that his man Frank can do anything he wanted to do. That he could do a half pound or a pound. That he had an import business. (RT-114). At no time did Dait either on his direct examination by the Government or on his cross-examination ever make such a statement. The inference that was left to the jury was that they could reasonably infer that Byrnes was involved in the importation of narcotics.

On September 29, 1975, during cross-examination of Sierra by counsel for Byrnes, he testified in response to a question as follows:

"Q Can you tell the Court what you testified to at that Grand Jury Hearing with regard to what Dait said about a man named Frank?

A I think he stated that Frank-- I think he could do any weight I wanted to as far as cocaine, take frequent trips to Florida and Peru, and he is opening or has opened an import-export business."(CT-8, RT-126)

Sierra was asked if there came a time when he found out such statement was untrue and he stated not that he knew of. He was asked if he had a chance look at the passport of Byrnes which was picked up by the Government after the arrest of Byrnes and he stated he could not recall. Counsel for Byrnes thereupon requested the production of Byrnes passport which was marked for identification. Counsel thereupon sought to have the passport of Byrnes introduced in evidence at which point the Court directed a conference at side bar. The following occurred at side bar.

" THE COURT: What is the purpose of this?

MR. RAPOPORT: To show that he was never in Peru. The testimony given was -- by Dait was that he had been to Peru and may have been in Florida.

THE COURT: How do we know that he was never in Peru under this passport of some other passport?

MR. RAPOPORT: If he were in Peru --

THE COURT: If you want to put him on the stand that is one thing. You won't get it in this way.

* * * * *

MR. RAPOPORT: If your honor please, this is a passport that United States Citizens are --

THE COURT: It is not proof of that proposition and it certainly not evidence of it. You can not do it that way."

(RT-28)(CT-9)

On Byrnes direct examination he testified that he had never been to Peru, that he did not know that country and that he never made

a trip to Peru from the United States. (RT-273). The passport was relevant and material and should have been admitted into evidence as an official document of the United States which is required to be carried by United States citizens while travelling abroad. The mere fact that other explanations may exist or even if it lacks probative value the jury can choose to ignore it. However, counsel for Byrnes sought its admission into evidence as a relevant document. Since the defendant is presumed innocent at all stages of a criminal proceeding until final judgment is rendered, a official United States document as a passport must be presumed to have been employed in a legal capacity by its user and if the defendant was in Peru, his passport would be so marked. The fact that there may be other or alternate explanations why a passport would not be marked is not a basis for denying the admission of the passport in evidence. Byrnes testified that he was only in Florida once and that was on the occasion of his brothers funeral on January 6, 1976.(RT-273)

The statement attributed to Dait by Sierra being completely unsupported by any testimony of Dait required refutation, as it bore directly upon the credibility of the witness. Left unrebutted, it is not unreasonable to assume that the jury could draw the inference that the testimony of Sierra was credible and conversely the denial of such fact by Byrnes unreliable and that Byrnes was in fact engaged in a conspiracy for the possession and distribution of narcotics. On the other hand if the passport were admitted into

evidence for whatever its probative value, the jury as the ultimate trier of facts could have concluded that the passport was reliable evidence and affect their evaluation of the credibility of Sierra who gave testimony that was inconsistent with the passport entries, which would show no entries stamps for Peru. Its exclusion from evidence on the grounds that it was not relevant was a serious and prejudicial error.

On summation, counsel for Byrnes, stated that the Government offered no evidence whatsoever to refute the testimony of the defendant that he never went to Peru and stated that there was no proof to establish such fact that he ever went to Peru. The inference created by Sierra's testimony was that Byrnes did indeed engage in the traffic of narcotics. At the very least such statement when made to the Grand Jury was clearly designed to create and in fact did create the impression that Byrnes was involved in international narcotic trafficking. If the passport were admitted it would have a material bearing on credibility of the government witness, Sierra, as well as raise doubts as to the credibility of Dait, and firmly establish the reasonable doubt that would result in the defendant, Byrnes's acquittal.

After the case had been submitted to the Jury for their deliberations, the first note received from the Jury on October 1, 1976, was a note marked Court Exhibit 1, stating that the "JURY WOULD LIKE TO SEE FRANK BYRNES PASSPORT AS EVIDENCE."(EX-13)

The Jury sought to ascertain whether Byrnes was telling the truth or whether Sierra was telling the truth in the statement which he attributed to Dait. The element of reasonable doubt existed in the minds of at least some of the jurors.

The matter was reviewed with the Court at which time counsel for Byrnes stated it was his understanding that the passport was not admissible as evidence. The Court noted that it made a ruling on it and asked if it would be acceptable if the Court endorsed upon the note that the passport was not in evidence and might not be considered by the jury and counsel indicated it was not acceptable. The Court stated that it was concluded that it had no probative value. (CT-10, RT-495, 8) The Court concluded the matter as follows:

"THE COURT: I tell you what I will do. Bring them in. I will instruct them that the passport is not in evidence. It was offered by the defendant, but the Court rules it inadmissible, very well.

MR. RAPOPORT: Very well, Your Honor.

MR. CARTER: Thank you.

MR. RAPOPORT: I might note on the record that I would respectfully except to that ruling.

(jury enters courtroom)

THE COURT: Members of the jury, in attempting to comply with my suggestion you asked for an exhibit that is the Frank Burns' passport which is not in evidence. You may recall that it was offered by the defense and on the Government's objection, the Court ruled that it was not admissible as not relevant.

So it is not in evidence. So will you please go back and try again.

THE CLERK: Note marked Court Exhibit 1.

(jury leaves the courtroom and resumed deliberations)(CT-10RT-499

The exclusion by the Court of the passport of the defendant Byrnes denied the jury the opportunity to review an important and relevant item of evidence and in so doing committed prejudicial error.

The evidence submitted against the defendant Byrnes was insufficient as a matter of law and the Indictment should have been dismissed at the conclusion of the Government's case.

Dait, testifying as an Unindicted co-conspirator on behalf of the Government testified that on December 26, 1974, January 10, 1975, and January 30, 1975, he sold cocaine hydrochloride to Bernard Sierra, in the amounts set forth in the indictment for which he received the respective sums of \$2,900.00 on the first sale; \$2,900.00 on the second sale and \$1,500.00 on the third sale.

Respecting Count One of the Indictment there was no testimony that Burgos, Dait and Byrnes entered into any arrangement or conspiracy to distribute narcotics. Examination of the transcripts in fact evidences the contrary conclusion. The only testimony of any Government witness even remotely suggesting that Byrnes could supply cocaine is a statement attributed to Byrnes by Dait on an undetermined date in the latter part of 1974, where Dait testifies that on one occasion while he and Burgos and Byrnes were at a bar

they were working at, they were all together when Dait allegedly heard Byrnes say, if you want coke let me know, but don't let anyone know where you are getting it from. When asked if that statement was directed to Burgos and himself, the best answer that Dait could supply was "I think so." (CT-6, RT-35,36). This is the sole statement in the entire 761 pages of testimony during this trial. Not only could Dait not state under oath that the statement, if it was indeed made, was directed to Burgos and Dait, but there is no reference whatsoever, to such an alleged statement when Dait testified before the Grand Jury on August 21, 1975;(CT-4) Equally devoid of any reference to such statement is the nine page sworn statement made by Dait on July 31, 1975;(EX-3). It should also be noted that such exhibit is witnessed by two agents on July 21, 1975, ten days before the said Dait executed same. There is no corroboration of such statement by either of the defendants or any other witness. It is not sufficient to say that conspiracies are by their very nature secretive but by their very nature they require an agreement to engage in a conspiracy to do certain acts and that arrangement between the parties as alleged in the indictment is never established. Naked assertions by alleged co-conspirators must be viewed in the light of reasonability. It is reasonable to assume that if the statement attributed to Byrnes by Dait were true, under intensive investigation by the many agents and U.S. Attorney, this statement would have been determined and included, not as an afterthought at the time of trial but before the Grand Jury or in the sworn statement.

Other than the aforementioned statement allegedly made by Byrnes there was no other testimony adduced during the entire trial that would indicate that there was an arrangement between the parties to conspire to distribute narcotics. The record is devoid of any testimony by any Government witness that Byrnes ever was seen to deliver any narcotics to Dait or Burgos. At no time does Dait allege that he saw Byrnes transmit any narcotic of any type to him or in furtherance of any plan to distribute narcotics at any time and more particularly on December 26, 1974, January 10, 1975 and January 30, 1975.

If indeed, the parties had conspired and were working in concert or pursuant to a common plan or scheme, obviously Dait would have been able to testify to such arrangement as well as witness the transfer of such narcotic from a supplier in order to effectuate their respective purposes. There is no testimony to that effect whatsoever.

There is no testimony that Burgos or Byrnes were ever present at any of the alleged sales. In fact, the Testimony clearly established that neither defendant was present at any sale. The record contains no testimony that Byrnes possessed any of the narcotics that constituted the sale to Sierra nor does the record contain any testimony that Byrnes ever distributed cocaine. The testimony clearly establishes the contrary.

Respecting the sale of December 26, 1974, it is the testimony of Dait that he allegedly received two ounces of cocaine from Burgos, not Byrnes. He alleges that after the sale he and Carlos went to Byrnes house and he states, "We walked in, said hello, sat down, smoked a joint and then Carlo gave him some money." (CT-6, RT-46)

He then states that Burgos and Byrnes spoke in spanish and shortly thereafter they left. On cross-examination, when asked where he received the two ounces of cocaine for Sierra on December 26, 1974, he stated that he obtained it from Carlos Burgos.(CT-7, RT-36) At no time does he remotely allude to any fact that h e received same from Byrnes. On further cross examination whether or not he actually saw how much money was given to Byrnes, he stated that he did not know. He further testified to the fact that the money which he saw Byrnes receive could have been \$23.00. He acknowledged that Burgos and Byrnes conversed in spanish and that he does not speak or understand spanish. The following questions and answers were given:

" Q So you don't know what was said and you don't know how much money Byrnes actually got from Burgos; is that correct?

A That's correct.

Q As a matter of fact, you don't even know, since the conversation was in spanish, the reason Burgos gave any money?

It is altogether your own surmising; is that correct?

A Yes."(CT-7, RT-A41, A42)

Dait testified that there were no other conversations on that day between Byrnes, Burgos and Dait on that date. Therefore, Dait's testimony precludes the possibility of any conversation referrable to any conspiracy. The mere fact of the meeting by the parties was no evidence of any conspiracy. Burgos and Byrnes specifically deny the events ascribed to December 26, 1974 and their alleged participation therein.

11-1 1-6-1 Present with

Dait testified that with respect to January 10, 1975, he and Carlos went to Frank Byrnes home, they left the room and when they came back Dait and Burgos left. Later that day they returned to Byrnes house. On cross-examination the following testimony was elicited:

"Q So that on January 10, 1975, did you ever see Burgos give Byrnes money?

A No.

Q As a matter of fact, you can't even testify to the fact that Burgos gave Byrnes anything; is that correct?

A That's right.

Q Nor can you testify to the fact that Byrnes gave Burgos anything on that day; is that correct?

A That's correct.

Q The same is true of December 26, 1975; you never saw Byrnes give anything to Burgos; is that correct?

A No.

* * * * *

Q There were no other conversations between the three of you on that day?

A That's possible.

Q I'm asking whether there were or weren't any?

A I don't remember."(CT-7, RT-44)

The fact that they met at Byrnes house does not establish a conspiracy.

The testimony of Dait as it appeared in Dait's sworn statement on page 7, set forth the following, "I did not see Byrnes give Burgos anything"; is that correct? A. Yes.(CT-7, RT-A-46)(EX-3) This was referrable to the period of January 30, 1975. He stated that he came to Byrnes house with Burgos but did not return that day or any day thereafter.

Dait then testified that at no time did he see Byrnes ever give cocaine to Burgos or anyone else on the days set forth in the indictment.(CT-7, RT-A52). Dait further testified that on the dates mentioned in the indictment he did/ ^{not} enter into any conversation with Byrnes and Burgos regarding the distribution of cocaine. (CT-7, R-A52) (CT-7,RT-A54) That neither Burgos or Byrnes was present when cocaine was sold to Sierra.(CT-7, RT-A60, A61)

"Q So would it be fair to say, in roughly the period of, say, December 1 or whenever, you fellows, supposedly first got in contact or was first contacted by Mr. Berkowitz"(the informant) "till after January 30, let's say, between roughly the time of December 1 or 4 and is it your testimony that you, at no time, other than the times mentioned on December 26, and again on January 10, other than that, at no time did you have a meeting with Frank and Carlos for the purpose of the distribution of drugs; is that your testimony?

A Yes.(CT7A71, A72).

By the testimony, all relevant periods of time referred to in the Indictment were effectively covered to establish beyond a

a reasonable doubt, that there were no conversations between December 4, 1974 and January 30, 1975, relative to the sale or distribution of narcotics with Frank Byrnes, the defendant-appellant herein. At the dates of the alleged meetings, to wit: December 26, 1974 and January 10, 1975, the said Dait, Burgos and Byrnes had no discussions relative to the sale or distribution of possession of cocaine. The testimony of Dait, cumulatively assessed, clearly supports the defendant-appellants contention that the Governments case should have been dismissed against the defendant Byrnes at the conclusion thereof. The fact that they socialized together does not raise their relationship to that of co-conspirators.

At a side bar, counsel for Byrnes stated that Dait had not seen Byrnes do anything. Mr Carter stated, that Dait saw Byrnes give to Burgos cocaine on the specific dates. (CT-7, RT-A67) There is absolutely no testimony referred to by Mr. Carter in the record.

The Court made the following statement:

"THE COURT: He"(referring to Dait)"has testified as to Statements by Burgos, where he got it. He testified as to Statements as to where Burgos was getting it.

MR. RAPOPORT: I don't believe he testified to that.

THE COURT: Oh sure. I think that the only thing he testified to was money going back. He has testified that Burgos, he got it from Byrnes, That's the way I understand the evidence in this case."(CT-7, RT-A68)

Examination of the testimony of Dait does not reveal any testimony by Burgos as to where he allegedly received cocaine nor does the record substantiate that there was any testimony by Burgos that

he received anything from Byrnes. The meetings were no evidence of conspiracy between the said parties. The evidence was insufficient as a matter of law.

ARGUMENT

Point I

THE TRIAL JUDGE ERRED IN HIS EVIDENTIARY RULING
EXCLUDING FROM EVIDENCE THE PASSPORT OF BYRNES
AS A PROBATIVE DOCUMENT TO CONTROVERT TESTIMONY
THAT BYRNES WENT TO PERU

It is the generally accepted rule that the trial judge has broad discretion in determining the relevancy and materiality of evidence for the purpose of ruling upon the admissability of such evidence.

It has been generally held that a broad rule of admissability is favored in Federal Courts. Fed. Rules Crim. Proc. rule 26, 18 U.S.C.A. Altom v. U.S., 454 F.2d 289;(Cir., 1971) cert. denied 92 S.Ct. 1765, 406 U.S. 917, 32 L.Ed.2d 116. All facts having a rational probative value are admissible unless some specific rule forbids. Murray v. U.S., 351 F.2d 330;(Cir., 1965) cert. denied 86 S.Ct. 1207, 383 U.S. 949, 16 L.Ed.2d 211. Relevancy describes the logical relationship between a proffered item of evidence and a proposition that is material or provable in a given case. Evidence is relevant when it is persuasive or indicative that a fact in controversy did or did not exist because the conclusion in question may be logically inferred from that evidence. U.S. Allison, 474 F.2d 236;(Cir., 1965) vacated on rehearing 490 F.2d 79, cert. denied 95 S.Ct. 91

Sierra gave testimony to the Grand Jury that Dait had told him that Byrnes could get any weight in cocaine because Byrnes made frequent trips to Peru and that he was opening an import-export business which in Sierra's professional opinion indicated that Byrnes was running a first class cocaine operation. Although the statement attributed to Dait is not established ^{by} any testimony given by Dait either in sworn statement, testimony before the Grand Jury or on direct-examination or cross-examination, it remained uncontroverted before the Grand Jury and created a prejudicial impression on the minds of the Grand Jurors which undoubtedly gave them a basis for indicting the defendant, Byrnes, which can be reasonably inferred from the above testimony.

Again, Sierra, on direct testimony at the trial of the defendant stated that he was in the import business and on cross-examination he stated that Dait said he could do any weight; that Byrnes took frequent trips to Peru and he had opened or was opening an import-export business. The evidence adduced at the trial with respect to Byrnes was circumstantial in nature. Burgos and Byrnes both denied the alleged conspiracy and the substantive counts.

Although the Government offered no evidentiary basis to corroborate this testimony by Sierra which he ascribed to Dait, the fact remained that a New York City Detective in an undercover capacity testified to facts, which if true, would be more than sufficient and likely to permit the triers of fact to immediately infer that the defendant Byrnes, by testimony attributed to Dait, was actually engaged in narcotic traffic on an international basis.

At the very least, it would not be unreasonable for the triers of facts to infer that Byrnes was involved in the distribution of cocaine and that he could obtain sizeable quantities of cocaine by virtue of his import-export business in Peru. This was the tenor of Sierra's testimony and left uncontrverted, it was likely that the jury could infer that Byrnes was involved in the conspiracy alleged in the indictment even in the absence of any other evidence. In seeking the admission into evidence of Byrnes passport, it bore the logical relationship between its evidentiary value and disputing the proposition of Sierra's testimony that Byrnes went to Peru. If by some official documentation, the jury could examine the passport and see physical evidence which would show that there was no indication that the defendant Byrnes ever left the United States on his alleged frequent trips to Peru, it would not be unreasonable to assume that the jury would give greater credence to the passport as an official document of the United States Government than the testimony which Sierra attributed to an unindicted co-conspirator who had admitted on the stand that he has lied and cheated, and was awaiting sentence pending the determination of this trial. The jury would be reasonably familiar with the usage of passports and could reach its own conclusions based upon such physical evidence. Since the defendant is always presumed innocent at all stages of a criminal proceeding unless found guilty, the jury has every right to assume in its examination of testimony and evidence that the defendant Byrnes used his passport in a legal manner. The probative value, if any, could be left to the jury to determine. Such passport was not a speculative

item of evidence nor is it conjectural. It was relevant and material because it would be persuasive or indicative of affording the defendant an opportunity to rebut the uncontroverted testimony of Sierra because the jury could logically conclude from their experience that if the defendant frequented Peru, his passport would be appropriately stamped. It would be a logical conclusion as opposed to Sierra's naked assertions which was unsupported and uncorroborated by any other testimony.

The Court stated the following:

"THE COURT: It is not proof of that proposition and it is certainly not evidence of it. You can not do it that way."

(CT-8, RT-128)

However, the passport was relevant to the defense as a means of refuting the testimony of Sierra, which standing alone was very damaging to Byrnes. It has been held that when the standard of relevance is met, as it was here, the existence of the possibility of explaining it away can not be employed to deny admission. U.S. v. Snow, 517 F.2d 441; (Cir., 1975). The law does not require relevant evidence to be perfect evidence but rather material to the controversy. The fact that Byrnes on Direct denied that he had ever been to Peru, the passport had strong probative value as an official document of the Government. The refusal of the trial judge to admit same was highly prejudicial. Relevancy of testimony does not rest upon its conclusiveness. All that is necessary is that it have enough rational connection with the issue to be considered a factor contributing to an answer. U.S. Pugliese, 153 F.2d 497; (2 Cir., 1946).

2 THE COURT. Counsel who are here and not on

The passport sought to be introduced obviously had a rational connection with the issue as to whether Byrnes made frequent trips to Peru as to contribute to an answer. Certainly, it was as relevant as the testimony of the Government explaining how it lost sight of a vehicle on four separate occasions when the vehicle was not attempting to lose it. (CT-9, RT 178)

The exclusion of the passport was highly prejudicial to the defendant Byrnes and constituted reversible error. It has been said that, "The Court's function is, in the usual simple case, only to decide whether a reasonable man might have his assessment of the probabilities of a material proposition changed by a piece of evidence." U.S. v. Schipani, 289 F.Supp 43; (D.C., EDNY 1968)

The jury requested that they see Frank Byrnes' Passport as evidence. Based upon the testimony sought to be introduced by Byrnes, it is not unreasonable to speculate that at least one or more jurors entertained a reasonable doubt as to the guilt of Byrnes and had reason to doubt the veracity of the testimony of Sierra. In U.S. v. Schipani, the Court stated the following:

" * * * If the trier concludes that one item of evidence is reliable, this may effect his valuation of the credibility of a witness who gives testimony inconsistent with this evidence. His evaluation of the credibility of this witness may, in turn, affect his conclusion as to the probative force of the witness' testimony with respect to another line of proof. But confirming evidence of that other line of proof may require a reevaluation of the witness' credibility and a complex readjustment of the assessment of all the interlocking evidence."

made it necessary to excuse one of the jurors

If the jury concluded that the passport was reliable and it did not indicate that Byrnes frequently visited Peru, as testified to by Sierra, it may have effected Sierra's credibility before the jury as the one who gave evidence which was inconsistent with the such evidence as was provided by examination of such passport. And this change in evaluation of Sierra's credibility may have in turn affected in the juries mind other testimony given by Sierra and Dait with regard to other proof. The evidence sought to be introduced was clearly relevant and while not inclusive or conclusive, it would have afforded the defendant, Byrnes and the jury, an opportunity to review such evidence and conclude that the testimony of Dait was not credible and conclude that defendant Byrnes was not engaged in a conspiracy to distribute narcotics. By denying the jury an opportunity to examine said passport, as a result of the ruling by the court that it was not relevant, the defendant Byrnes was severely prejudiced in his trial and suffered irreparably before said jury who were constrained to reach a verdict without benefit of an item of evidence that created the highest and first priority in the juries request for Exhibits to permit them to reach and fair and just verdict.

POINT II

THE TRIAL JUDGE ERRED IN DENYING BYRNE'S MOTION TO DISMISS THE INDICTMENT AS THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW, BECAUSE AT BEST, IT SHOWS THAT BYRNES WAS ONLY ASSOCIATED WITH DEFENDANT BURGOS AND THE UNINDICTED CO-CONSPIRATOR DAIT

2 || The community has an interest in that, too.

In U.S. v. Cimino, 321 F.2d 509;(2 Cir, 1963) cert. denied, 375 U .S. 974, 84 S.Ct. 491, 11 L.Ed.2d 418(1964) wherein prosecution witnesses proved a meeting between Cimino and D'Ercole, on two separate dates and it was determined that no witness overheard their conversations or saw anything passed from one to the other, that such mere meeting was no evidence that they were conspirators. The Court further stated that Cimino's statement to an agent th at one Joe Z was the source of the heroin sold by Cimino was not to be considered as competent evidence against D'Ercole. The Court stating that to rule otherwise would result in hearsay lifting itself by its bootstraps to the level of competent evidence citing Glasser v. U.S., 3 5 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680.

In the instant case the only thing that Dait saw that was allegedly passed was money on January '0, '975, which Dait on cross-examination acknowledged that not only did he not know how much money Byrnes got from Burgos but he did not know for what reason Burgos gave Byrnes some money.(CT-7, RT-A4', A42. The testimony of Dait was devoid of credibility. At best the evidence in this case at best, only proves that Byrnes was associated with Dait and Burgos and any occasions for their association were purely on a personal and social basis. The record is absolutely devoid of any proof that cocaine passed to or from Byrnes to Burgos or Dait. If there were in fact, a conspiracy, Dait would have been fully apprised of all details as he would have been, according to his own testimony the one who negotiated the price, had possession of the narcotics and had possession of the money. Dait would have been able to

seeing Byrnes with cocaine and giving the money directly to Byrnes rather than an intermediary. The reason that Dait could not so testify is that neither Burgos nor Byrnes were involved in any conspiracy to distribute cocaine or possess cocaine with the intent to distribute of to distribute cocaine. The testimony is so clear when analyzed that the evidence was insufficient as a matter of law and the Indictment should have been dismissed at the conclusion of the Government's case.

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed against the defendant-appellant, Frank Byrnes.

Respectfully submitted,

Robert Jay Rapoport
Attorney for Frank Byrnes
defendant-appellant

United States of America vs.

United States District Court for

Eastern Dist. of NY

DEFENDANT

FRANK ~~BURNS~~ c BYRNES

DOCKET NO. ➔

75 CR 746

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH DAY YEAR
12-9-76

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Robert Rappaport

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☐ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged

☒ GUILTY. in counts 1 to 7 incl.

**FINDING &
JUDGMENT**

Defendant has been convicted as charged of the offense(s) of violating T-21, U.S. Code, Secs. 841(a)(1) and 846; T-18, U.S. Code, Sec. 2, in that on or about and between Dec. 6, 1974 and Jan. 30, 1975, both dates being approximate and inclusive, the defendant, with another, did knowingly and wilfully conspire to distribute various quantities of cocaine, a Schedule II narcotic drug controlled substance and did distribute various quantities of cocaine

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

**SENTENCE
OR
PROBATION
ORDER**

2 years to run concurrently as to each of the 7 counts
and special parole term of 5 years. Execution of sentence
stayed pending appeal.

**SPECIAL
CONDITIONS
OF
PROBATION**

**ADDITIONAL
CONDITIONS
OF
PROBATION**

**COMMITMENT
RECOMMEN-
DATION**

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
★ DEC 9- 1976 ★
TIME A.M. _____
P.M. _____

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☐ U.S. District Judge

☐ U.S. Magistrate

Edward R. Neacher

Date

12-9-76

15

BEST COPY AVAILABLE

ATLANTA DISTRICT COURT - CRIMINAL DOCKET

☒ JUDGE/Assigned Trial
☐ MAGISTRATE
 District Office: **207** / **1**
 Disposition: **1**

U.S. vs. **75 CR 746-2**
BURNS, FRANK #2
BYRNES, FRANK (amended 11-24-75)

Day: **10** / **75** / **146**
 No. of **2** Defendants
 Neahe: **for**

CHARGES

24-841(a)(1), 846
 18-2

Did conspire to distribute
 various quantities of cocaine

MAJOR CASE NO.
 Bail # **1000**
☐ Personal Recog
☐ Unsecured Bond
☐ Conditional Release
 Set (1000) **10**
☒ 10% Depo
☒ Surety Bk
☐ Collateral
☐ Bail Not Made
☐ 3rd Party Custody
☐ Bail Status Changed
☐ PSA
 (See Docket)

Appledy

Copy of letter apptg counsel
 Brian Rappaport
 66 Court St., Bklyn, NY.

ARREST	INDICTMENT	ARRAIGNMENT	TRIAL
U.S. Control or Egan in Charge	Information: 10-9-75 Waived: <input type="checkbox"/> Supervising: <input type="checkbox"/>	Trial Set For: 5/3/76 <input checked="" type="checkbox"/> Not Guilty <input type="checkbox"/> Nolo <input type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input type="checkbox"/> Nolo <input type="checkbox"/> Guilty	Verdict: <input type="checkbox"/> Trial Begun: <input type="checkbox"/> Trial Ended: <input type="checkbox"/>

SEARCH WARRANT	ISSUED	DATE	INITIAL/No.	INITIAL APPEARANCE	INITIAL/No.	OUTCOME
Summons	Issued			PRELIMINARY EXAMINATION OR REMOVAL HEARING <input type="checkbox"/> Waived <input type="checkbox"/> Not Waived <input type="checkbox"/> Intervening Indictment		Dismissed Held for District CJ Held to Answer to U.S. District Court AT: 75 Magistrate's Initials:
	Served					
Arrest Warrant						
COMPLAINT				Tape No	INITIAL/No.	
OFFENSE (In Complaint)						

Show last names and suffix numbers of other defendants on same indictment/information		V. Excludable Entry		
DATE	PROCEEDINGS	(a)	(b)	(c)
10-9-75	Before Neahe, J - Indictment filed - Bench Warrant Ordered and issued.			
10-22-75	Before NEAHER, J - case called - deft present with atty - deft waives reading of the indictment - court orders the deft to turn over passport to custody of AUSA Johnson-court enters plea of not guilty on behalf of deft - bail:\$10,000 surety or 10% cash - case adjd to Oct. 28, 1975 for status report.			
10-22-75	By SCHIFFMAN, Magistrate - Order for acceptance of cash bail filed.			
10/23/75	Bench warrant retd and filed- executed			
10/24/75	Notice of readiness for trial filed			
10-28-75	Before CATOGGIO, MAG. case called- AUSA APPLEBY present. DC Davidian and deft present. D.C. waived reading of the indictment Pleading not guilty to indictment. Case adj. to November 3, 1975 At 10:00 AM for all motions before Judge Neahe.			
10/28/75	Before NEAHER, J.- Case called- deft preset without counsel deft signs financial affidavit-case adjd to 11/3/75 at 10:00 A.M. for all purposes			
10/28/75	Financial affidavit filed			
10-29-75	Copy of letter filed from Judge Neahe apptg counsel Brian Rappaport as counsel for the deft. CJA #20 to be executed by counsel.			

SECTION V. ANY OCCURRENCE OF EXCLUDABLE

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
11-3-75	Before Neaher, J - case called - deft present with counsel Steven Harris. Atty Harris admitted to practice for this proceeding - Notice of Appearance filed - deft waives reading of the indictment - deft to turn over his passport to U.S. Atty. by today - case adjd to Nov. 24, 1975 for status report.				
11-3-75	Notice of Appearance filed (for this appearance) by Steven Harris, 302 E. 72 St. NYC. 861-3406				
11-24-75	Before NEAHER, J - case called - defts & attys present - Govt moves to amend caption of indictment to read FRANK BYRNES - granted - defts move for order of dismissal - decision reserved - bail contd - adjd to Dec. 15, 1975 for status report.				
12/1/75	Stenographers Transcript dated 11/3/75 filed				
12/5/75	Stenographers Transcript dated 11/24/75 filed				
12/15/75	Before NEAHER, J.- Case called- deft and counsel present - deft's motion to dismiss- denied- deft moves to to have bail exonerated-motion granted- case adjd to 4/19/76 at 10:00 A.M. for trial				
12/17/75	By NEAHER, J.- Copy of Order releasing bail filed				
2-5-76	75 M 1834 inserted in CR file				
4-9-76	76 M 633 (CBE) inserted in CI file				
4-19-76	Before NEAHER, J - case called - deft & atty present - adjd to May 3, 1976 for trial.				
5-3-76	Before NEAHER, J - case called -deft & atty present - adjd to May 17, 1976 for trial				
5-17-76	Before NEAHER, J - case called - deft & counsel present - adjd to follow USA vs. Anzalone, etal on the week of May 24, 1976.				
6-7-76	Before NEAHER, J - case called - deft not present - counsel Robert Rappaport present - case adjd to July 22, 1976 for trial				
7/22/76	By NEAHER, J. - Bench warrant ordered & issued.				
7/22/76	Before NEAHER, J. - Case called. Deft Burgos, present with Counsel. Deft Byrnes & Counsel not present. Case adjd to 7/26/76 at 9:30 for suppression hearing. Case adjd to 9/20/76 at 10:00 a.m. for trial/				
7/26/76	Case called. Deft not present, Counsel present - Rappaport. Rappaport moves to vacate Bench Warrant orded on 7/22/76 . Motion granted. Defts motion to dismiss the indictment. Decision reserved. Suppression hearing begun. Suppression hearing continued to 9/20/76 at 10:00 a.m. Case adjd to 9/20/76 at 10:00 a.m. for trial.				
9/16/76	Stenographers transcript dated 7/26/76 filed.				
9/20/76	Before NEAH ER, J.- Case called. Deft & Counsel present. Case adjd to 9/21/76 at 10:00 a.m. for trial.				
9/21/76	Before NEAHER, J. - Case called. Deft & Counsel present. Suppression hearing continued. Hearing continued to 9/22/76 at 10:00 a.m.				
9/22/76	Before NEAHER, J. - Case called. Deft & Counsel present. Hearing resumed. Deft rests. Govt rests. Decision reserved. Hearing concluded. Case adjd to 9/24/76 at 10:00 a.m. for trial.				

Interval
(per Section II)

Start Date
End Date

Lin. Total
Lsd. Days

Byrnes, Frank
BURNS, FRANK

Yr. Docket No. Dr.

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELA		
		(a)	(b)	(c)
9/23/76	Before NEAHER, J. - Case called. Deft & Counsel present. Trial ordered and begun. Jurors were selected and sworn. Trial continued to 9/27/76 at 10:30 a.m.			
9-27-76	Before Neaheer, J - case called - defts & counsel present - trial resumed - trial contd to 9-28-76			
9-28-76	Stenographers transcript filed dated 9-23-76			
9-28-76	Before Neaheer, J - case called - trial resumed - trial contd to 9-29-76			
9/29/76	Before NEAHER, J. - Case called. Deft & Counsel present. Trial resumed. Trial continued to 9/30/76 at 10:00 a.m.			
9/30/76	Before NEAHER, J - Case called. Deft & Counsel present. Trial resumed. Deft moves to dismiss counts 1, 2, 3, 4, 5, 6, and 7 - argued - denied. Trial continued to 10/1/76 at 11:00 a.m.			
10-1-76	Before NEAHER, J. - Case called - Deft and counsel present - Trial resumed - Juror #9 excused and replaced by Alt. #1 - Court charges Jury - Alternate discharged - Marshal sworn - Order of sustenance signed - Jury retires to deliberate - Jury returns with verdict of guilty on each of counts 1-7 - Jury polled - Jury discharged - Deft's motion for Judgment of Acquittal made at conclusion of deft's case is now denied - Bail cont'd - Trial concluded - Case adjd w/o date for sentence - Deft to surrender passport to U.S. Atty.			
10-1-76	By NEAHER, J. - Order of sustenance filed.			
10/19/76	Stenographers transcript dated 10/1/76 and 9/30/76 filed.			
12-9-76	Before Neaheer, J - case called - deft & counsel Mr. Rapoport present - deft sentenced to 2 yrs imprisonment to run concurrently as to each of the 7 counts and special parole term of 5 years - execution of sentence stayed pending appeal. Deft advised of his right to appeal - clerk directed to file Notice of appeal on behalf of the deft without fee. Financial affidavit filed - bail contd pending appeal - deft to report once a week by phone to the probation dept.			
12-9-76	Judgment and commitment filed - certified copies to Marshal.			
12-9-76	Notice of appeal filed, without fee.			
12-9-76	Docket entries and duplicate of notice mailed to the court of appeals			
12/27/76	Notice of Appeal filed. (by counsel)			
12/27/76	Docket entries and duplicate of Notice of Appeal mailed to the C of A			
1-5-77	Order filed received from the Court of Appeals that the record be docketed on or before 1-17-77, in default of which the appeal shall be dismissed forthwith.			
1-5-77	Stenographer's Transcript dated December 9, 1976 filed.			
1-14-77	Stenographers transcript filed dated 9-28-76			

initial, both defendants on trial are charged with

AO-257

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT ED NY
OCT 9 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TIME A.M.....
P.M.....

----- X

UNITED STATES OF AMERICA

-against-

Cr.No. _____

CARLOS BURGOS and
FRANK BURNS,

(T. 21, U.S.C. §841(a)(1)
and §846 and T. 18, U.S.C.
§2)

Defendants.

----- X

THE GRAND JURY CHARGES:

75 CR 746

COUNT ONE

On or about and between the 6th day of December 1974 and the 30th day of January 1975, both dates being approximate and inclusive, within the Eastern District of New York, the defendant CARLOS BURGOS, the defendant FRANK BURNS and David Dait, herein named as a co-conspirator but not as a defendant, did knowingly and wilfully conspire to distribute various quantities of cocaine, a Schedule II narcotic drug controlled substance, in violation of Title 21, Section 841(a)(1), United States Code. (Title 21, United States Code, Section 846).

In furtherance of the said unlawful conspiracy and for the purpose of effecting the objectives thereof, the defendants CARLOS BURGOS, FRANK BURNS and co-conspirator David Dait, committed the following:

O V E R T A C T S

1. On or about December 26, 1974 the defendants CARLOS BURGOS, FRANK BURNS and co-conspirator David Dait had a meeting in Queens, New York.
2. On or about January 10, 1975 the defendants CARLOS BURGOS, FRANK BURNS and co-conspirator David Dait had a meeting in Queens, New York.

COUNT TWO

-2-

On or about the 26th day of December 1974, within the Eastern District of New York, the defendants CARLOS BURGOS and FRANK BURNS, did knowingly and intentionally possess with intent to distribute approximately two (2) ounces of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, §841(a)(1), and Title 18, United States Code, §2).

COUNT THREE

On or about the 26th day of December 1974, within the Eastern District of New York, the defendants CARLOS BURGOS and FRANK BURNS, did knowingly and intentionally distribute approximately two (2) ounces of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, §841(a)(1) and Title 18, United States Code, §2).

COUNT FOUR

On or about the 10th day of January 1975, within the Eastern District of New York, the defendants CARLOS BURGOS and FRANK BURNS, did knowingly and intentionally possess with intent to distribute approximately two (2) ounces of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, §841(a)(1) and Title 18, United States Code, §2).

COUNT FIVE

On or about the 10th day of January 1975, within the Eastern District of New York, the defendants CARLOS BURGOS and FRANK BURNS, did knowingly and intentionally distribute approximately two (2) ounces of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, §841(a)(1) and Title 18, United States Code, §2).

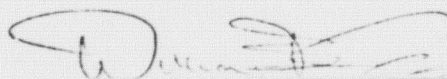
COUNT SIX

On or about the 30th day of January 1975, within the Eastern District of New York, the defendants CARLOS BURGOS and FRANK BURNS, did knowingly and intentionally possess with intent to distribute approximately two (2) ounces of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, §841(a)(1) and Title 18, United States Code §2).

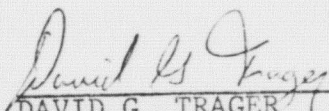
COUNT SEVEN

On or about the 30th day of January 1975, within the Eastern District of New York, the defendants CARLOS BURGOS and FRANK BURNS, did knowingly and intentionally distribute approximately two (2) ounces of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, §841(a)(1) and Title 18, United States Code, §2).

A TRUE BILL



FOREMAN



DAVID G. TRAGER
United States Attorney
Eastern District of New York

No. _____

UNITED STATES DISTRICT COURT

EASTERN District of NEW YORK

CRIMINAL Division

THE UNITED STATES OF AMERICA

vs.

CARLOS BURGOS and

FRANK BURNS, Defendants.

INDICTMENT

Title 21, U.S.C. §841(a)(1) and
846 and Title 18, U.S.C. §2

A true bill,

Foreman.

Filed in open court this _____ day
of _____, A. D. 19____

Clerk.

Bail, \$_____

RICHARD W. APPLEBY, AUSA

596-3090

TLPMP2

PA:KG

Charge by the Court

THE COURT: Counsel who are here and not on the case on trial, deserve an explanation. I had expected to charge a jury at nine o'clock this morning, and was here for that purpose. Unfortunately, something occurred which made it necessary to excuse a juror to have a hearing in the matter and that threw our schedule off.

I feel that I must go forward with my charge. It will take I would say perhaps 45 minutes. Under those circumstances if anyone wishes to do something in 45 minutes and return you may feel free to do that. If you wish to wait, that is all right with me.

MR. LANDSMAN: Are you going to seal the courtroom?

THE COURT: Yes.

THE CLERK: Should I bring out the jury?

THE COURT: Yes.

(whereupon the jury entered the courtroom at 10:00)

THE COURT: Good morning members of the jury. You may wonder why after urging you so strenuously we are only starting a few minutes after ten, but perhaps you may understand something occurred. I was here ready to go, but an incident occurred which

Charge by the Court

made it necessary to excuse one of the jurors. Accordingly, I am going to ask alternate juror 1 to take his place up there in the second row. I regret that unexpected unanticipated delay, and I am now ready to go forward with the charge.

Members of the jury, we are now at the stage of trial where you are about to undertake your final function as jurors. Your duty is a serious and important one. In performing it you actively share with the Court the responsibility of administering justice according to law and the evidence in this case.

Your oath as jurors obligates you to discharge this final task in an attitude of complete fairness and impartiality. And as was emphasized by me when you were selected as jurors without bias or prejudice for or against the Government, or the defendants as parties to this controversy.

The case is important to the Government since it considers enforcement of the criminal laws of prime importance for the welfare of the community. Obviously it is equally important to the defendants who are charged with serious crimes and have the right to receive a fundamentally fair trial.

Charge by the Court

1
2 The community has an interest in that, too.
3 Let me add, the fact that the Government is a party
4 entitles it to no greater consideration than that
5 accorded to any other party to a litigation.

6 By the same token it is entitled to no less
7 consideration. All parties, Government and indivi-
8 duals alike stand as equals before the bar of justice.

9 Your final role is to decide and pass upon the
10 fact issues in this case. You are the sole and
11 exclusive judges of the fact. You determine the
12 weight of evidence. You appraise the credibility
13 of the witnesses. You draw the reasonable inferences
14 from the evidence. You resolve such conflicts as there
15 may be in the evidence.

16 I shall later refer to how you determine the
17 credibility of witnesses. My final function is to in-
18 struct you as to the law, and it is your duty to
19 accept these instructions as to the law and to apply
20 them to the facts as you may find them.

21 With respect to any fact matter it is your
22 recollection and yours alone that governs. As I
23 have already told you anything that counsel either for
24 the Government or the defense may have said with re-
25 spect to matter in evidence whether during the trial,

Charge of the Court

in a question, in argument or in summation, is not to be substituted for your own recollection of the evidence.

As to anything the Court may have said during the trial or may refer to during the course of these instructions as to any matter in evidence. It is not to be taken in lieu of your own recollection. There are certain principles of law which apply in every criminal case and to which I made reference and emphasized at the time of your selection as jurors. I repeat them now.

The indictment is merely an accusation, a charge. It is not evidence or proof of a defendant's guilt. Each defendant on trial has pleaded not guilty. Thus, the Government has the burden of proving the charges against each defendant beyond a reasonable doubt.

They do not have to prove their innocence. On the contrary they are presumed to be innocent of the accusations contained in the indictment. This presumption of innocence was in their favor at the start of the trial, continued in their favor throughout the entire trial, is in their favor and as I instruct you now, remains in their favor during the course of your deliberations in the jury room.

1 It is removed only if and when you are satisfied
2 the Government has sustained its burden of proving the
3 guilt of each defendant beyond a reasonable doubt.

4 The question that naturally comes up is what
5 is a reasonable doubt. The words almost define
6 themselves, that there is a doubt founded in reason and
7 arising out of the evidence in the case or the lack of
8 evidence. It is a doubt which a reasonable person
9 has after carefully weighing all the evidence.

10 Reasonable doubt is a doubt which appeals to
11 your reason, your judgment, your common sense and
12 your experience. It is not caprice, whim, speculation
13 conjecture or suspicion. It is not an excuse to
14 avoid the performance of an unpleasant duty. It is
15 not sympathy for a defendant.

16 If after a fair and impartial consideration
17 of all the evidence you can candidly and honestly say
18 you are not satisfied of the guilt of a defendant
19 on trial, that you do not have an abiding conviction
20 of his guilt, in short if you have such a doubt as
21 would cause you as prudent persons to hesitate before
22 acting in matters of importance to yourselves then you
23 have a reasonable doubt, and in that circumstance it
24 is your duty to acquit.

25 On the other hand, if after such an impartial

Charge by the Court

7
1 and fair consideration of all the evidence you can
2 candidly and honestly say you do have an abiding
3 conviction of the defendant's guilt such a conviction
4 as you would be willing to act upon in important
5 and weighty matters, in the personal affairs of your
6 own life, then you have no reasonable doubt, and
7 under such circumstances it is your duty to convict.
8

9 One final word on this subject, reasonable
10 doubt does not mean a positive certainty or beyond all
11 possible doubt. If that was the rule few persons
12 however guilty they might be would be convicted.
13 It is practically impossible for a person to be ab-
14 solutely and completely convinced of any controversial
15 fact which by its nature is not susceptible to
16 mathematical certainty, in consequence.

17 The law in a criminal case is that it is
18 sufficient if the guilt of a defendant is established
19 beyond a reasonable doubt, not beyond all possible
20 doubt.

21 Before I turn to the charges against the
22 defendants I wish to repeat a caution which I gave you
23 during the trial. And that is that the guilty plea
24 entered by David Dait, to which he testified
25 while on the stand is no evidence whatever of the

Charge by the Court

4
1
2 guilt of either defendant on trial and you must not
3 permit Dait's plea of guilty to enter into your
4 deliberations at any time regarding the question of
5 the guilt of these defendants.

6 Now, let us turn to the charges contained
7 in the indictment which I will again read to you.
8 The Grand Jury charges in count 1 that on or about
9 the 26th day of December, 1974, and the 30th day of
10 January, 1975, both dates being approximate and in-
11 conclusive, within the Eastern District of New York,
12 the defendant, Carlos Burgos, the defendant, Frank
13 Byrnes, and David Dait, herein named as a co-conspirator
14 but not as a defendant, did knowingly and willfully
15 conspire to distribute various quantities of cocaine,
16 a Schedule 2 narcotic drug controlled substance, in
17 violation of Title 21, Section 841 (a-1), United States
18 Code, and Title 21 United States Code, Section 846.

19 In further reference of the said unlawful
20 conspiracies and for the purpose of effecting the
21 objectives thereof, the defendants, Carlos Burgos,
22 Frank Byrnes and co-conspirator, David Dait committed
23 the following overt acts:

24 One, on or about December 26, 1974 the
25 defendant, Carlos Burgos, Frank Byrnes and

Charge by the Court

co-conspirator, David Dait had a meeting in Queens, New York. Then follows a series of what are known as substantive counts or charges. Now these are counts 2, 3, 4, 5, 6, and 7.

Now, 2, count 2, count 4, and count 6 all charge the defendants on trial, Carlos Burgos and Frank Byrnes with knowingly and intentionally possessing approximately two ounces of cocaine hydrochloride, each on three different dates. Count 2, the possession is alleged to have occurred on December 26.

Count 4, the possession is alleged to have occurred on January 10, 1975, and count 6 the possession is alleged to have occurred on January 30, 1975. All in violation of Title 21, U.S. Code Section 841 (A-1) and Title 18, U.S. Code Section 2.

Now we turn to counts 3, count 5, and count 7. Each of those counts charge the separate substantive offense of knowingly and intentionally distributing two ounces of cocaine hydrochloride each on three separate dates. The three separate dates being those previously referred to in the counts dealing with possession, namely December 26, January 10 and January 30, the last three dates being in 1975.

I will summarize the indictment in that way,

Charge of the Court

10
because I believe that the mere repetition of words over and over again are more apt to be confusing than enlightening. Now, in summary you will note first, that the defendants on trial have been charged in count one with conspiring with David Dait as a co-conspirator to distribute cocaine in violation of a federal law known as the Drug Abuse Prevention and Control Act.

Count 1 alleges that this conspiracy took place during the period between the sixth day of December 1974 and the thirtieth day of January, 1975, both dates being approximate and inclusive and I might add at this point that if you are satisfied by the evidence beyond a reasonable doubt that a conspiracy was formed, the dates in or about the time in question; exact dates are not required to be proved by the Government.

Second, the defendants on trial are charged in count 2, 4, and 6, with possessing quantities of cocaine hydrochloride with intent to distribute, also in violation of the same federal drug act. As I pointed out they are alleged to have done so on three different dates. Namely, December 26, 1974 and January 10 and 30 in 1975.

Charge of the Court

Third, both defendants on trial are charged in count 3, 5, and 7, with distributing quantities of cocaine hydrochloride, also in violation of the same federal drug act. This is alleged to have been done on that same three dates I mentioned; namely, December 26, 1974 and January 10 and 30, 1975.

Now the congressional purposes expressed in the Federal Drug Act was to exercise federal control in order to prevent traffic in, or improper use of drugs having a substantial and detrimental effect on the health and general welfare of the american people.

Criminal penalties of fine or imprisonment or both are provide for violations of the act. The provisions upon which the charges in this indictment are based read in pertinent part as follows, and I refer to Section 841 (A-1) which I mentioned in reading the indictment and that section states:

"It shall be unlawful for any person knowingly or intentionally to distribute or dispense or possess with intent to distribute or dispense a controlled substance." And Section 846 of the same law provides that any person who conspires to commit any offense defined in this sub-chapter is punishable by imprisonment or fine or both.

Charge of the Court

Before I spell out what the Government must prove in order to establish violations of the foregoing statute beyond a reasonable doubt, there are certain terms in those statutes which require explanation.

Section 841 requires that the distribution or possession be done knowingly or intentionally. The purpose of the word "knowingly", is to ensure that no one shall be convicted for an act done because of mistake or accident or any other innocent reason.

An act is done knowingly if it is done voluntarily and intentionally. That is deliberately in disregard of the law. A transaction is not intentional unless it is knowing, so the two words knowingly or intentionally may be considered together.

The words, "with intent to distribute", simply mean that the person understands that the narcotics are not for his own personal use but are intended to be sold, delivered, transferred or made available to somebody else. The word, "possess" as used in the statute is understood in law to describe two types of possession, actual possession or constructive possession.

Actual possession means that a defendant knowingly has personal, manual or physical control of

Charge of the Court

1
2 drugs, has them in his hand, in his pocket or where-
3 ever, but they are in his manual, physical control.
4 Constructive possession means that although the drugs
5 are in the physical possession of another person,
6 a defendant knowingly has the power to exercise
7 control over them or their distribution. That is to
8 set the price for their sale or to cause their
9 delivery.

10 Finally, a word about the term, "controlled
11 substance", appearing in the statute. Those terms
12 are used because the law applies to a broad range of
13 narcotic drugs and substances which have drug-like
14 effects. The cocaine hydrochloride referred to
15 in the indictment commonly known as cocaine, for
16 short, is a narcotic controlled substance covered by
17 the statute.

18 I will first turn to those counts which charge
19 the defendants with having possessed cocaine with in-
20 tent to distribute it. Those counts are 2, 4, and
21 6, which name both defendants on trial.

22 Before a defendant may be convicted on any
23 possession count, the Government must establish
24 beyond a reasonable doubt, the following essential
25 elements:

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One, that on or about the date mentioned the defendant possessed with intent to distribute a quantity of cocaine specified.

Two, that he did so knowingly or intentionally. Three, that the narcotic controlled substance was in fact, cocaine hydrochloride.

In considering the evidence bearing on the foregoing element, there are two points you should keep in mind: First, the Government does not claim it has direct proof that the defendant, Byrnes, personally had possession of the cocaine. I will explain to you later what we mean by direct evidence as distinguished from circumstantial evidence.

Rather, the Government claims that the cocaine came into the physical possession of Burgos, who passed it to Dait who sold it to the undercover agent, Detective Sierra, but that there is circumstantial evidence that Byrnes was the source or had the power to bring about the distribution and sale of the narcotics or otherwise exercise control over them.

Now you understand I am simply paraphrasing what the Government claims in this case. I have not stated any evidence or implied to you, you understand, that these are the facts because these are the facts

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you must attempt to find from the evidence beyond a reasonable doubt.

Now, the second point you should keep in mind is this: Where two or more persons are charged with the commission of a substantive crime, that is possession or distribution, and we distinguish substantive crimes from conspiracy, that is the reason I use that word, where two or more are charged, the guilt of any defendant may be established without proof that he personally did every act constituting the offense charged.

This is so because under Section 2 of Title 18, U.S. Code referred to in the indictment which I mentioned, every person who willfully participates in the commission of a crime may be found to be guilty of that offense.

Section 2 reads, "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal. Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, punishable as a principal."

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Under this statute it is not even necessary that the aider or abettor be present at the actual commission of the offense. I caution you, however, that mere presence and guilty knowledge on the part of a person would not suffice to make him an aider and abettor. You must be convinced beyond a reasonable doubt that he was knowingly doing something to assist in committing the crime.

To determine whether a defendant on trial here aided and abetted the commission of an offense, namely either the possession or the distribution of cocaine you ask yourself these questions:

Did he associate himself with the venture? Did he participate in it as something he wished to bring about? Did he seek by his action to make it succeed?

If he did, then he is an aider and abettor. Accordingly, you may find the defendant Byrnes guilty of the offense of knowingly and intentionally possessing cocaine with intent to distribute it or distributing it, if you find from the evidence beyond a reasonable doubt that Burgos committed the offense of possessing and distributing the cocaine and that the defendant Byrnes aided and abetted him.

Charge of the Court

Now let us turn to the counts which charge distribution of cocaine, namely, counts 3, 5 and 7, in each of which both defendants are named. Before either defendant may be convicted on any one of those counts, the government must establish beyond a reasonable doubt, the following essential elements:

One, that on or about the date mentioned in the particular count, the defendants distributed a narcotics controlled substance. Two, that the defendants acted knowingly or intentionally. Three, that the narcotics controlled substance was, in fact, cocaine hydrochloride.

Again, I remind you where two or more persons are charged with the commission of a substantive crime, the guilt of a defendant may be established under Section 2 without proof that he personally did every act constituting the offense charged as I have heretofore explained to you.

Now we turn to a different kind of offense. The crime of conspiracy, with which the defendants on trial are charged in count 1 based upon Section 846 of the Drug Act which I have read to you. In that count, to repeat, it is alleged that the defendants together conspired with the co-conspirator Dait during

Charge of the Court

18
1 the period from on or about December 6, 1974 to January
2 30, 1975.
3

4 A conspiracy to commit a crime is an entirely
5 separate and distinct offense from the substantive
6 crime or crimes which are the object of the conspira-
7 cy and those are the possession and distribution
8 counts which I have just explained to you.

9 A conspiracy is simply a combination, agree-
10 ment or understanding of at least two persons to
11 accomplish by concerted action a criminal or unlaw-
12 ful purpose. In this case, the substantive crimes
13 of possessing and distributing cocaine, which I have
14 just dicussed. A conspiracy is often referred to as
15 a partnership in crime in which each partner acts
16 and speaks for the others in the furtherance of the
17 partnership business even if he was not present.

18 Bear in mind , however, that mere association
19 of a defendant with an alleged conspirator does not
20 establish his participation in a conspiracy, nor is
21 knowledge without participation sufficient. In order
22 to convict either defendant on count 1, the government
23 must proof beyond a reasonable doubt the following
24 essential elements:

25 One, the existence of the conspiracy charged

Charge of the Court

19
1 in the indictment. Two, that the particular defendant
2 knowingly associated himself with the conspiracy, and
3 three, that one of the conspirators knowingly committed
4 at least one of the other acts set forth in counts
5 2 through 7 of the indictment at or about the time
6 alleged.
7

8 One may become a member of a conspiracy with-
9 out full knowledge of all the details of the conspir-
10 acy. On the other hand, a person who has no knowledge
11 of a conspiracy but happens to act in a way which
12 furthers some object or purpose of the conspiracy
13 does not thereby become a conspirator.

14 Before you may find that a defendant on trial
15 has become a member of a conspiracy, the evidence
16 must show beyond a reasonable doubt that the conspir-
17 acy was knowingly formed and that the defendant who
18 is claimed to have been a member willfully participated
19 in the unlawful plan with the intent to advance or
20 further some object or purpose of the conspiracy.

21 To act or participate willfully means to act
22 or participate voluntarily and intentionally as I
23 have already explained those words, and with specific
24 intent to do something the law forbids; or with
25 specific intent to fail to do something the law

Charge of the Court

20
1 requires to be done. That is to say, to act or participate with the bad purpose either to disobey or to disregard the law. So if a defendant on trial with understanding of the unlawful character of a plan, knowingly encourages, advises or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a willful participant, a conspirator.

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9 One who willfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy. In determining whether a conspiracy existed, you should consider the actions and declarations of all the alleged participants which, in this case, would include David Dait as an alleged co-conspirator. However, in determining whether a particular defendant on trial was a member of the conspiracy, if any, you should consider only that defendant's acts and statements. He cannot be bound by the acts or declarations of other participants unless it is established that a conspiracy did in fact exist, and that he was one of its members.

23 If you are unable to find beyond a reasonable doubt, that either the defendant Burgos or the defendant ^{Ynez} Burns was a participant in a conspiracy

Charge of the Court

with David Dait, then you must acquit them, since a person cannot conspire with himself.

With the foregoing instructions in mind, let us now turn to the evidence bearing upon the charges in the indictment. By evidence, I mean of course all the testimony you have heard, except that which I have instructed you to disregard, whether brought out on direct examination or on cross examination, all the exhibits admitted into evidence regardless of who introduced them and all stipulations of fact. As to the latter, the parties through counsel have stipulated that if a government chemist had been called as a witness at this trial, he would have testified that he analyzed the white powder in plastic containers received in evidence as Government's Exhibits 2, 3 and 5 as cocaine hydrochloride.

This is not to say that the defendants admit any knowledge or participation in respect of such cocaine, on the contrary, they flatly deny it.

Even though there is no dispute about the nature of the exhibits I have mentioned, your function as judges of the facts requires you to find beyond a reasonable doubt that the substance is, in fact, cocaine hydrochloride.

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If you should so find, then I instruct you as a matter of law it would fulfill the requirement of a narcotics controlled substance as specified in the Drug Act.

Since counsel for the government and the defendants last evening reviewed in detail the evidence in this case and emphasised their respective contentions, I do not intend to add my own version. I believe that you have heard enough, that this case has not been all that long and that you have as good a recollection as any jury would have to assist you in focusing upon the issues of fact you will have to decide.

As i indicated earlier in the charge, a defendant may be proven guilty by either direct or circumstantial evidence. Direct evidence is the testimony of one who asserts full knowledge of a fact. That which came to him by virtue of his senses, such as an eye witness.

Circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. By circumstantial facts, we mean those which are established in terms of common experience. Facts from which one may logically infer

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1 the existence of other facts. As an example of what
2 I mean, suppose you are on vacation and someone takes
3 you for a boat ride and says there are a lot of islands
4 out there that had never been visited before and you
5 were brought up on the shore of one and you take a
6 short walk on the beach and you find a watch in the
7 sand. Well, you would immediately conclude that your
8 guide had been in error because you would immediately
9 conclude that the presence of a watch in the sand
10 would have indicated that some human being had been
11 there before. That is what I mean by inferring the
12 existence of a fact from another fact.
13

14 You understand, that happened to be a combina-
15 tion of direct and circumstantial evidence. You saw
16 the watch in the sand. You had been told by the guide
17 these were previously unvisited islands but the very
18 presence of the watch would bring to your mind the
19 fact that there must have been a possessor who could
20 have only been a human being.

21 Of course, you might indulge in something
22 fantastic and think that perhaps some wild animal
23 had gone down to the shore and caught a fish and the
24 fish had a watch in its stomach that somebody dropped
25 over from a tour boat. But you do not indulge in

1
2 those fantasies and common sense,
3 comes to mind that there had been someone there who
4 lost his watch.

5 Now, the law makes no distinction between the
6 weight to be given to either direct or circumstantial
7 evidence. Circumstantial evidence if believed is of
8 no less value than direct evidence. In either case
9 you must be convinced beyond a reasonable doubt of the
10 guilt of a defendant.

11 In this case, as I said, the government relies
12 upon both direct and circumstantial evidence. Whether
13 a defendant knowingly and intentionally participated
14 in the claimed conspiracy presents an issue of fact.
15 Clearly, this concerns what is in one's mind. Medical
16 science has not yet devised an instrument where we can
17 go back to the time of the occurrence of events and
18 determine what then was a person's intent or knowledge.

19 These may only be determined from one's acts,
20 his conduct and surrounding circumstances and such
21 inferences which may reasonably be drawn therefrom.
22 If you find circumstances of secrecy, intrigue or
23 attempts to conceal the true nature of the transaction,
24 these may be considered by you as circumstantial evi-
25 dence of criminal intent.

Charge of the Court

Proof of motive is not a necessary element of the crime which the defendants are charged with. Proof of motive does not establish guilt, nor does want of proof of motive establish that a defendant is innocent.

If the guilt of a defendant is shown beyond a reasonable doubt, it is immaterial what the motive of a crime may be or whether any motive may be shown, but the presence or absence of a motive is a circumstance which you may consider as bearing on the intent of a defendant.

I have not adverted to the evidence in this case as I have said, because of the extended discussion by counsel in their summations. All evidence, whether or not they or I have referred to it, is important and must be considered by you.

As I have told you a number of times, it is your recollection and yours alone that governs and that whatever counsel, either for the Government or for the defense, have said about it or which I may have said about it is not to be taken by you in lieu of your own recollection.

Always it is your recollection and yours alone that governs and you must unhesitatingly reject

Charge of the Court

any statement as to a fact which has been made which does not accord with your own recollection.

It must be apparent to you that the versions of the Government and the defense as to what the evidence has shown, what inferences may be drawn from the evidence are in sharp divergence and that critical issues of fact and credibility are raised.

You are called upon to decide fact issues here. How do you decide that? Now, I think you understand where at the start of the trial I suggested it would be desirable and important for you not only to listen but to look at the witnesses as they testify. Your determination of the issue of credibility very largely must depend upon the impression that a witness made upon you as to whether or not he was telling the truth or giving you an accurate version of what occurred.

I often say to jurors when you walk in the door of the courtroom, sit in the jury box during trial and later on when you are deliberating in the jury room you have your common sense, your good judgment, and your experience with you.

You decide whether or not a witness was straight-forward and truthful. Whether he attempted

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1 to conceal anything. Whether he has a motive to
2 testify falsely, whether there is any reason why he
3 might color his testimony.
4

5 In other words what you try to do to use the
6 vernacular, is to size a person up, just as you would
7 do as I have said before in any important matter where
8 you were undertaking to determine whether or not a
9 person is truthful, candid and straight-forward.
10 In passing upon the credibility of a witness you
11 may also take into account inconsistencies or contra-
12 dictions as to material matters in his own testimony,
13 or any conflict with that of another witness.

14 A witness, however, may be inaccurate, contra-
15 dictory or even untruthful in some respects and yet
16 be entirely credible in the essence of his testimony.

17 The ultimate question for you to decide in pas-
18 sing upon credibility is did the witness tell the
19 truth before you, as to essential matters. Aside
20 from the general considerations I have just mentioned
21 regarding the effect of the testimony of a witness,
22 there are some special instructions which apply here
23 to David Dait.

24 As you are aware, the Government contends that
25 through his testimony, it has in addition to

Charge of the Court

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2 circumstantial evidence offered direct proof of the
3 conspiracy. Government counsel referred to him as
4 the inside man. Dait is named in fact in count 1 as
5 a co-conspirator. By his own admissions on the stand
6 he must be regarded as an accomplice in the offenses
7 with which the defendants on trial are charged.

8 Accomplice is one who willingly associates
9 himself with the commission of a crime. In making
10 that statement, however, I admonish you that that is
11 not to be taken as any implied admission that a crime
12 occurred. You have to decide whether a crime occurred
13 in which these defendants are involved beyond a
14 reasonable doubt.

15 You understand that is the fundamental question.
16 The law does not prohibit the use of accomplices and
17 whether you approve or disapprove of their use is not
18 to enter into your consideration of the case.

19 In certain types of crime the Government of
20 necessity is frequently compelled to rely on the
21 testimony of accomplices. Otherwise it would be
22 difficult to detect or prosecute some wrongdoers and
23 this is particularly true in conspiracy cases. Often
24 it has no choice in the matter. It must take witnesses
25 to the transactions as they are.

29

Charge of the Court

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2 There is no requirement in the Federal Court
3 that the testimony of an accomplice be corroborated.
4 A conviction may rest upon the uncorroborated tes-
5 timony of such a witness if it is found credible and
6 reliable. However, the testimony of such a witness
7 should be viewed with great caution and scrutinized
8 carefully.

9 Nevertheless it does not follow that because a
10 person has acknowledged participation in a crime or
11 is an accomplice that he is not capable of giving
12 a truthful version of what occurred. You should
13 ask yourself these questions:

14 Did David Dait give false testimony, or did he
15 color his testimony contrary to fact because he has
16 not been prosecuted on the remaining charges in the
17 indictment or believes that his cooperation may result
18 in more lenient treatment?

19 If you find his testimony was deliberately
20 untruthful, you should unhesitatingly reject it.

21 On the other hand, if upon a cautious and
22 careful examination you are satisfied that he has given
23 a truthful version of essential events beyond a rea-
24 sonable doubt, there is no reason why you should not
25 accept it.

Charge of the Court

One more instruction with respect to witnesses.

The fact that the Government's witnesses here, aside from David Dait were police officers does not entitle their testimony to any greater weight or consideration than that accorded to any other witness in the case.

You will evaluate their credibility the same way you do with any other witness. If you find that any witness, and that applies to Government and defense, testified falsely as to any material fact, you have the right to reject the testimony of that witness in its entirety, or you may accept that fact or portion which recommends itself to your belief as credible.

Now, the law permits, but does not require a defendant to testify in his own behalf. The defendants here on trial have taken the witness stand. Obviously, each defendant has a deep personal interest in the result of his prosecution. Interest creates a motive for false testimony. In appraising a defendant's credibility you may take that fact into consideration.

However, it by no means follows that simply because a person has a vital interest in the end

Charge of the Court

1
2 result, that he is not capable of telling a truthful,
3 candid and straight-forward story.

4 It is for you to decide to what extent, if at
5 all, a defendant's interest has affected or colored
6 his testimony. During the course of the trial, the
7 attorneys, at various times, have objected to certain
8 questions, have moved to strike answers and taken
9 other positions before you. These are matters that
10 are the proper concern of the attorneys and should
11 not concern you in your deliberations.

12 I instruct you that you are not to draw any
13 inferences from the fact that attorneys have made
14 objections or motions before you during the trial.
15 The Government, to prevail in this case, must prove
16 the essential elements I have outlined by the required
17 degree of proof as already explained in these in-
18 structions. If it succeeds, your verdict should be
19 guilty.

20 The case of each defendant on trial must be
21 considered separately as if he alone was on trial
22 and with respect to each separate count of the
23 indictment. Thus, there are various possible ver-
24 dicts.

25 You may find each defendant not guilty; you

Charge of the Court

may find each guilty, or you may find one not guilty on some counts and the other guilty on some counts, whatever the case may be.

However, to find one defendant guilty of the crime of conspiracy alleged in the indictment, you must find that he was engaged in the conspiracy beyond a reasonable doubt with at least one other person, whether on trial or not on trial, since, as I have told you, a conspiracy requires an agreement or understanding between at least two persons.

The verdict in each instance must be unanimous. Your function is to weigh the evidence in the case and determine the guilt or innocence of the defendant solely upon the basis of such evidence and these instructions.

Under your oath as jurors, as I mentioned previously, you cannot allow a consideration of the sentence which may be imposed upon a defendant if he is convicted to enter into your deliberations or to influence your verdict in any way. Your duty is to decide the case solely and only on the evidence.

In the event of a conviction, the duty of imposing sentence rests solely with the Court.

In your deliberations, each juror is entitled

Charge of the Court

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to his or her own opinion, but each should offer and exchange views with his fellow jurors. That is the very purpose of juror's deliberations, to discuss and consider the evidence, to listen to the arguments of fellow jurors, to present your individual views, to consult with one another and to reach an agreement based solely on the evidence, if you can do so without violence to your own individual judgment.

Each one must decide the case for himself or herself after consideration with his or her fellow jurors, but you should not hesitate to change an opinion which after discussion with your fellow jurors appears erroneous.

However, if after carefully considering all the evidence and the arguments of your fellow jurors you entertain a conscientious view that differs from others, you are not to yield your judgment simply because you are outnumbered. The charges here are most serious. The just determination of this case is important to the public and is equally important to these defendants on trial.

Under your oath as jurors, you must decide this case without fear or favor and solely, as I have stated many times, in accordance with the evidence

Charge of the Court

and the law.

If the Government has failed to carry its burden as to a defendant, your sworn duty is to acquit. If it has carried its burden as to a defendant, your sworn duty is to convict.

Now, members of the jury, because there are two defendants and some seven counts in this indictment, I have prepared a form of special verdict, the original of which will be given to your foreman who by custom is Juror Number 1. There are copies for each of you which you may have as a guide in considering the various counts of the indictment and you will be permitted to take these into the jury room with you.

You will, of course, also be entitled to have any of the exhibits which have been offered into evidence, except the cocaine, in the jury room.

(Laughter)

My suggestion, however, with respect to the exhibits, is to commence your deliberations on the basis of your recollection of the evidence and as you deliberate, if it becomes necessary to resolve some matter by reference to an exhibit, send in a note. That is the customary way, through the marshall who guards your door.

Charge of the Court

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2 You will have paper and pencils in there and
3 we will produce the particular exhibit for your in-
4 spection. Similarly, if in the course of your discus-
5 sion of any particular testimony, a question should a-
6 rise which necessitates perhaps your refreshing your
7 recollection by having testimony read back, I suggest
8 that you ask for something of a specific nature and
9 avoid asking for the whole testimony of the witnesses
10 to be read back, because the whole purpose of this is
11 to have the jury determine this.

12 As I have said, you have been sitting here for
13 four days. You have heard and viewed the witnesses.
14 You have formed impressions, but it is possible that
15 in the course of your deliberations, and it is per-
16 fectly understandable and proper, that questions should
17 come up and when these questions come up for resolu-
18 tion of testimony, that is the time to ask for it so
19 you can clear that matter up and go on to something
20 else and not wait around for the whole rehash of
21 testimony or a whole bundle of exhibits.

22 Now, I am going to excuse you for a couple of
23 minutes in order to give counsel an opportunity to
24 let me know whether I have misspoken anything in my
25

Charge of the Court

1
2 charge or ommitted anything which I ought to have in-
3 structed you upon, and after that we will send word
4 either to have you come out or to begin your delibera-
5 tions.

26
6 Now, at this point there is one alternate jur-
7 or I must excuse because only twelve of you may de-
8 liberate on the case. Do you have some belongings in
9 the jury room?

10 ALTERNATE JUROR: Yes.

11 THE COURT: Why don't you go into the jury
12 room and get your card and report downstairs.

13 This is always a sad parting, I know, but you
14 have served your function very well and as it turned
15 out we did require one alternate here, so you should
16 not consider yourself useless. You are like a good
17 spare tire at midnight on a dark road. Thank you
18 very much.

19 ALTERNATE JUROR: Thank you, Judge.

20 (Alternate Juror is excused)

21 THE COURT: As soon as the alternate juror re-
22 moves the belongings, you may go to the jury room and,
23 as I say, there will be pencil and paper there and I
24 will give the original and the clerk will give the
25 original and twelve copies, really, I guess, original

Charge of the Court

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2 and eleven will do here, although maybe the foreman
3 might want one to write on in the first instance.
4 You may go into the jury room and the standard method
5 of procedure, as I have said, is to communicate through
6 counsel.

7 In view of the hour here I am going to ask the
8 clerk to pass menus around and with the suggestion
9 that since it is a rainy day, you might rather have
10 your lunch in the jury room and you can order beverages
11 and sandwiches and we will take care of that
12 also. You can show your preferences and the marshall
13 will arrange to take care of that.

14 (Whereupon the clerk swore in the marshall)

15 You may let them go back for a few minutes
16 while I give counsel a chance to comment on the
17 charge.

18 MR. DAVIDIAN: I think the charge was very
19 good, Your Honor.

20 MR. RAPPAPORT: No exception to it.

21 MR. CARTER: No exception.

22 THE COURT: I am overwhelmed.

23 MR. DAVIDIAN: I think you covered the point
24 very fully and carefully.

25 THE COURT: Well, you can tell the marshall

Charge of the Court

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1 to let them go ahead and, did you get copies of that?

2
3 MR. RAPPAPORT: No, sir. May we have it?

4 THE COURT: I will give it to you.

5 (Time noted 11:00)

6 THE CLERK: I have the exhibits.

7 THE COURT: We had better get that on the
8 table. Don't you have one exhibit, Defendant's Exhibit?

9 MR. DAVIDIAN: I have one exhibit which is a
10 carbon copy.

11 MR. RAPPAPORT: I think inside here I have a
12 picture but I also have a problem. On the train, my
13 little button came off and I can't get into my brief-
14 case.

15 THE COURT: Mr. Carter and Mr. Rappaport.

16 MR. RAPPAPORT: That is a problem, Your Honor.

17 THE COURT: We have a note.

18 MR. RAPPAPORT: That is a problem, Your Honor.

19 THE COURT: Are you aware of its contents?

20 MR. RAPPAPORT: We have that as an exhibit,
21 not offered in evidence, Your Honor and I may be
22 wrong but it was my understanding in your conversa-
23 tion that this was not something that I could bring
24 before the jury. That is what I did.

25 MR. CARTER: That is not in evidence.

Charge of the Court

MR. RAPPAPORT: It is not in evidence, no
Your Honor.

THE COURT: I think I have made a ruling on
it and that is why I submit it in evidence.

THE COURT: Let me ask you this, if I simply
endorse on this note that the passport is not in
evidence and may not be considered by you, if I write
that on the note will that be acceptable?

MR. CARTER: That would be acceptable to me.

MR. RAPPAPORT: It wouldn't be acceptable to me.
No sir, because Your Honor I was under the impression
as a result of our discussion that I could not bring
that in and so that is why I want to do over the
initial now unless I was under a misconception at
that time Your Honor.

No sir, it was my intention and I wanted to
offer it as evidence at that time and I thought as
a result of our discussions that I could not write
that into evidence because that would be no more
support of the situation because he could have been
out of the country in any way which was the reason
why pursuant --

MR. CARTER: The fact remains, the passport
is not in evidence and may not be conceived.

Charge of the Court

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2 THE COURT: My recollection as we discussed
3 what probative value it had, we concluded it had
4 nil.

5 MR. RAPPAPORT: You didn't let me in, and
6 I thought I couldn't bring it in.

7 THE COURT: They have his testimony.

8 MR. RAPPAPORT: Would the Government stipulate
9 to have it in evidence?

10 MR. CARTER: Absolutely not.

11 THE COURT: I don't know why they have such
12 consuming interest in it.

13 MR. RAPPAPORT: I know why, Your Honor. I
14 have no doubt in my mind and I would be very dis-
15 appointed they want to know whether he lied and
16 whether he ever was to Peru or not and that is
17 what I told them I would try to get them. I felt
18 I was precluded.

19 MR. CARTER: Your Honor's ruling reached exact-
20 ly that point when you had concluded that was the
21 very reason it wasn't admitted into evidence and for
22 that, should not consider it as proof of anything.

23 MR. RAPPAPORT: Your Honor, they are entitled
24 to in my conception certainly the jury is entitled to
25 listen to any evidence. If they could listen to the

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1
2 naked assertion of a co-conspirator not commenting
3 on what he said. Certainly I think six, the document
4 is a document provided by the United States Govern-
5 ment that for whatever the probative value would have
6 at least it would be initiated or I felt it would be
7 initiated, that Sierra, that Dait made the asser-
8 tion that my man, Frank could get a half a pound be-
9 cause he goes to Florida.

10 This doesn't mean he couldn't go on rowboat
11 and he couldn't sneak out of the country by submarine,
12 but this would at least show on the passport he
13 cannot leave the country. Dait apparently told
14 Sierra he went to Peru.

15 I made a point about it but Your Honor told me
16 it could not go in and at this point I think Your
17 Honor can well appreciate that somebody obviously
18 has brought this up and wants to know if my man is
19 lying or not.

20 MR. CARTER: The fact remains Your Honor,
21 whatever particular decision is made by the Govern-
22 ment and defense whether or not to offer a certain
23 piece of evidence --

24 MR. DAVIDIAN: I would --

25 MR. CARTER: If I may finish. Whether or not

Charge of the Court

the decision to offer a piece of evidence when it is binding upon either the Government or the defense, the pact remains that the passport is not in evidence.

THE COURT: I tell you what I will do. Bring them in. I will instruct them that the passport is not in evidence. It was offered by the defendant but the Court ruled it inadmissable, very well.

MR. RAPPAPORT: Very well, Your Honor.

MR. CARTER: Thank you.

MR. RAPPAPORT: I might note on the record that I would respectfully except to that ruling.

(jury enters the courtroom)

THE COURT: Members of the jury, in attempting to comply with my suggestion you asked for an exhibit that is the Frank Burns' passport which is not in evidence. You may recall it was offered by the defense and on the Government objection, the Court ruled that it was not admissible as not relevant.

So it is not in evidence. So will you please go back and try again.

THE CLERK; Note marked Court Exhibit 1.

(jury leaves the courtroom and resumed deliberations)